No. 22,427

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAURICE M. WILLS and GERTRUDE E. WILLS,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE

TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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STATEMENT OF THE ISSUES PRESENTED

1. May the taxpayer, an outstanding Los Angeles Dodger baseball player during the years involved, deduct pursuant to Section 162(a)(2) of the Internal Revenue Code of 1954 the expenses he incurred for meals, lodging, and transportation within the vicinity of Los Angeles as traveling expenses incurred "while away from home" because he maintained his residence in the vicinity of Spokane, Washington?

2. Was the fair market value of an MG automobile that was awarded to the taxpayer for being voted the "most popular Dodger" in 1962 received by him "primarily in recognition of religious, charitable,

scientific, educational, artistic, literary, or civic achievement" and, therefore, excludable from his gross income pursuant to Section 74(b) of the 1954 Code?

3. Was the fair market value of the Hickok belt that was awarded to the taxpayer for being voted the outstanding professional athlete of the year 1962 received by him primarily in recognition of one or more of the achievements set out in Section 74(b) of the Code and, therefore, excludable from his gross income pursuant to that provision?

STATEMENT OF THE CASE

This petition for review (I-R. 67-70) involves federal income taxes for the years 1962 and 1963 in the amounts of $1,441.28 and $4,753.75, respectively (I-R. 65). On March 7, 1966, the Commissioner of Internal Revenue mailed to the taxpayers a notice of deficiencies in those taxes. (I-R. 7-11.) On April 21, 1966, the taxpayers filed their petition with the Tax Court for a redetermination of those deficiencies. (I-R. 1-11.) In its opinion of June 14, 1967, reported at 48 T.C. 308, the Tax Court, insofar as is relevant here, sustained the Commissioner's determination of deficiencies. (I-R. 43-59.) The court's decision was entered on July 26, 1967. (I-R. 65.) The taxpayers filed their petition for review of that decision on October 20, 1967. (I-R. 67-70.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

The relevant facts, some of which were stipulated (I-R. 31-39), as found by the Tax Court (I-R. 44-48), are as follows:

The taxpayers are husband and wife who filed joint income tax returns on a cash basis for the calendar years 1962 and 1963 with the District Director of Internal Revenue for the State of Washington. (I-R. 31; Exs. 1-A, 2-B.)

The taxpayer has been a professional baseball player since 1951. From June, 1959, through November, 1966, he played baseball for the Los Angeles Dodgers, a major league team. (I-R. 31-32, 45; II-R. 30; Pet. Br. 23.)

In 1962 the taxpayer, among other accomplishments as a Dodger, broke the major league baseball record for the most stolen bases in one season. He was the subject of leading national magazine articles. He appeared in the 1962 All-Star game where he was voted "player of the game." He was voted the "most valuable player" of the National League and received various awards from the press and other groups. (I-R. 32-34, 36, 46.)

In October, 1962, the taxpayer was awarded an MG automobile having a fair market value of $1,731,[2/] for being voted the "most popular Dodger." The automobile award was based solely on the vote taken among the baseball patrons at a particular game held at the Dodger stadium in Los Angeles shortly before the award was made.

1/ Since a joint income tax return was filed by husband and wife, both are petitioners here. In this brief, however, the term "taxpayer" refers only to the husband.

2/ It was stipulated that the car had a retail value of $2,196 and a wholesale value of $1,731. (I-R. 33.)

A printed program distributed to the patrons at that game had a provision allowing them to vote for the "most popular Dodger" and the taxpayer won that vote. (I-R. 33-34, 46-47.)

In January, 1963, the taxpayer received the S. Rae Hickok belt having a fair market value of $6,038.19.[3/] The Hickok belt is awarded annually to the outstanding professional athlete of the year, the predominent criterion for electing each year's recipient being his excellence in athletics. The ballots for electing the winner of the Hickok belt were sent to over 250 sportswriters and sportscasters throughout the United States, and the outcome of that vote determined who received the award. The taxpayer could have disposed of the Hickok belt at any time after he received it. (I-R. 36-38, 47; Exs. 6-F, 7-G.)

The taxpayer first purchased a house in Spokane, Washington, in 1958, and he and his family used this house as a personal residence until 1962.[4/] In January, 1962, the taxpayer purchased a second house in Veradale, Washington, on the outskirts of Spokane. At that time the taxpayer and his family (of five children) vacated their first Spokane residence and moved into the second house, in which they

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3/ The belt was jewel-studded. After the taxpayer received the belt, one of its gems was removed by, and used in a ring for, the taxpayer's wife. (I-R. 36, 47.)

4/ During the 1959 baseball season, until the taxpayer was called up by the Dodgers in June, 1959, he played 48 games for Spokane, Washington, a Los Angeles Dodgers AAA farm club, in the Pacific Coast League. (I-R. 31-32.)

resided during the years involved.[5] When the taxpayer was in Spokane, he stayed at that residence. The taxpayer spent 138 days and 96 days of the years 1962 and 1963, respectively, in Spokane, and lived during that time at his Veradale residence. (I-R. 34-35, 45-46.)

Approximately one-half of the Dodgers' games were played each season at their home stadium in Los Angeles and the taxpayer spent not less than 87 days in 1962 and in 1963 in Los Angeles as a member of the Dodger baseball team. In 1963, he also spent four additional days in Los Angeles in connection with the World Series. He spent the remainder of the 1962 and 1963 baseball seasons at (or traveling to and from) the various other National League cities where the other Dodger games were played.[6] (I-R. 32, 34-35, 45, 51; Exs. 8-H, 9-I.) The taxpayer spent five or six weeks every spring in Florida for spring training and approximately a week in the winter of 1962 and two weeks in the winter of 1963 in Las Vegas, Nevada, where he participated in a night club routine with five other members of the Dodger team. He also performed in the routine in Miami, Florida, in 1963. (I-R. 34-35; see also II-R. 5, 46-47.) In 1963, the taxpayer also spent additional time--possibly as much as 21 days--in Los Angeles rehearsing for his nightclub routine. (I-R. 35-36, 45.)[7]

5/ The taxpayer retained the first house as rental property until he sold it in 1965. (I-R. 34, 45.)

6/ The length of the baseball season was approximately 177 days in 1962 and 184 days in 1963. (I-R. 34-35.)

7/ In the light of the table specifying taxpayer's locations during the years 1962 and 1963 (I-R. 35), it is not clear whether or not the 21 days that he spent in 1963 in Los Angeles rehearsing for the

(continued)

When in Los Angeles, the taxpayer lived with the pastor of the church that he attended there. Taxpayer paid rent for those accommodations. (I-R. 46.)

On his income tax returns, the taxpayer reported $38,095 for 1962 and $45,794 for 1963 as salaries received from the Los Angeles Dodgers. (Ex. 1-A, pp. 1, 6; Ex. 2-B, pp. 1, 8.) His player's contracts with the Dodgers provided that he was to receive $29,750 for the 1962 season and $30,000 for the 1963 season, to be paid to him semi-monthly at the Dodger headquarters in Los Angeles. (I-R. 45; Exs. 3-C, 4-D.) In addition to his contract salaries, the taxpayer also received $5,000 in 1962 and in 1963 from the Dodgers for public relations work performed by him in the Spokane vicinity for the Spokane Indians, a Dodger Minor League team. Had the taxpayer lived in the Los Angeles area, similar employment--public relations work for the Dodgers--would have been available to him there. The taxpayer also received and reported $19,400 as gross income received in 1963 from his night club appearances in Las Vegas and Miami.[8/] (I-R. 34, 46, 52; Ex. 4-D, pp. 1, 10.)

7/ (continued)
nightclub routine (I-R. 35-36) came within the baseball season or at some other time. Accordingly, the Tax Court found only that taxpayer spent some (I-R. 45) "additional time" in Los Angeles preparing for that routine. (See also II-R. 48.)

8/ The taxpayer testified that he owned business property in Spokane--he was a partner in the Flora Motel. (II-R. 61.) He reported a $1,093 loss for 1962 and a $450 loss for 1963 from the motel operation, and $557 long-term capital loss upon its sale in 1963. (Ex. 1-A, p. 3; Ex. 2-B, pp. 3, 6.) Taxpayer also reported a $1,015 loss for 1963 from the rental of his original Spokane residence. (Ex. 2-B, p. 4.)

The Tax Court sustained the Commissioner's determination that the fair market value of the MG automobile and the Hickok belt were includible in the taxpayer's gross income, and that the deductions claimed for meals, lodging, and transportation expenses incurred in the vicinity of Los Angeles were not allowable.[9/] (I-R. 48-59.) Taxpayers petition for review of that decision. (I-R. 67-70.)

9/ For the year 1962, the taxpayer claimed traveling expense deductions of $1,305 for meal expenses and $900 for lodging expenses incurred in Los Angeles. (Ex. 1-A, p. 6.) The Commissioner disallowed this entire amount ($2,205), but allowed the taxpayer an unclaimed traveling expense deduction of $966 for the 138 days he was in Spokane, for a net disallowance of $1,239. (I-R. 9, 35, 48.)

For the year 1963, the taxpayer claimed traveling expense deductions of $1,305 for meal expenses, $1,050 for lodging expenses, and $412 for cab fares and automobile expenses incurred in the Los Angeles area. (Ex. 2-B, p. 8.) The Commissioner disallowed this entire amount ($2,767) but allowed the taxpayer an unclaimed traveling expense deduction of $672 for the 96 days that he was in Spokane, for a net disallowance of $2,095. (I-R. 10, 35, 48.) (The stipulation of facts (I-R. 35) is in error insofar as it states that the taxpayer claimed only $2,095 of Los Angeles traveling expense deductions for 1963.)

In addition to his claimed traveling expenses for 1963, the taxpayer also claimed deductions of $1,360 for meal expenses incurred in connection with his night club appearances (Ex. 2-B, p. 10), of which $315 was disallowed by the Commissioner because (I-R. 10) "it has not been established that * * * [it] constitutes an ordinary and necessary business expense or was expended for the purpose designated." (See also I-R. 35-36.) The $315 expense may have been incurred in Los Angeles while taxpayer was rehearsing for his night club performances (I-R. 35-36), but the taxpayer introduced no evidence to rebut the Commissioner's determination that it did not constitute an ordinary and necessary expense. The Tax Court either considered the issue to have been abandoned (I-R. 44) or decided, sub silentio, that it was governed by its holding that the taxpayer's principal place of business was Los Angeles (I-R. 51, 53-54), which precluded the deduction of any living expenses incurred in that vicinity.

ARGUMENT

I

SINCE THE TAXPAYER'S PRINCIPAL PLACE OF BUSINESS WAS LOS ANGELES, THE TRANSPORTATION, MEALS, AND LODGING EXPENSES HE INCURRED IN THAT VICINITY ARE NOT DEDUCTIBLE

A. Introduction

One of the issues in the instant case is whether the taxpayer, an outstanding Los Angeles Dodger baseball player, may deduct from his gross income the costs of transportation, meals, and lodging that he incurred in the vicinity of Los Angeles, where he pursued his livelihood. Section 162(a)(2) of the Internal Revenue Code of 1954, Appendix, infra,[10] provides that a taxpayer may deduct as ordinary and necessary business expenses "traveling expenses (including amounts expended for meals and lodging * * *) while away from home in the pursuit of a trade or business."[11]

If the expenses in question are not (Section 162(a)(2)) "traveling expenses" deductible under that provision, they are non-deductible "personal" or "living" expenses. Section 262 and Sections 1.62-1(g), 1.162-2(e) and 1.262-1 of the Treasury Regulations on Income Tax (1954 Code), Appendix, infra; Commissioner v. Flowers, 326 U.S. 465,

10/ Except as otherwise indicated, reference to sections are to the Internal Revenue Code of 1954.

11/ As amended by Section 4(b), Revenue Act of 1962, P.L. 87-834, 76 Stat. 960, Section 162(a)(2) refers to "traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances)." Prior to that amendment, the statute referred to "traveling expenses (including the entire amount expended for meals and lodging)." The amendment is effective only for taxable years ending after December 31 1962, and is therefore applicable here for the year 1963.

(continued)

469-470 (1946); James v. United States, 308 F. 2d 204, 206-207 (C. A. 9th, 1962); Smith v. Warren, 388 F. 2d 671, 672 (C. A. 9th, 1968).[12/]

It is well established that expenses incurred by a taxpayer in the vicinity of his principal place of business are generally not de-deductible as traveling expenses. Commissioner v. Flowers, supra; see also Commissioner v. Stidger, 386 U.S. 287 (1967). Of course, where a taxpayer pursues two or more businesses at widely separated locations, the costs of traveling between them and the living expenses incurred at the minor business post are deductible because a taxpayer cannot be expected to avoid such expenses by moving away from his principal place of business. In that sense, such expenses are required by the exigencies of his businesses. Steinhort v. Commissioner, 335 F. 2d 496, 504 (C. A. 5th, 1964); Chandler v. Commissioner, 226 F. 2d 467 (C. A. 1st, 1955); see Wright v. Hartsell, 305 F. 2d 221, 225 (C. A. 9th, 1962).[13/]

11/ (continued)
Items deductible pursuant to Section 162(a)(2) as traveling expenses may be deducted from gross income to arrive at adjusted gross income. Section 62(2)(B) and Section 1.62-1 of the Treasury Regulations on Income Tax (1954 Code), Appendix, infra.

12/ Unlike the situation in Smith v. Warren, supra, the taxpayer here does not contend that if the transportation expenses in question are not deductible as traveling expenses pursuant to Section 162(a)(2) they are deductible from gross income as business transporation expenses pursuant to Sections 62(2)(C) and 162(a).

13/ However, on a one-day trip to the minor duty post not requiring sleep or rest, no expenses are deductible under Section 162(a)(2) as traveling expenses. United States v. Correll, 389 U.S. 299 (1967). Transportation expenses on such trips may be deductible under Sections 62(2)(C) and 162(a) as ordinary and necessary business expenses. Bell v. Commissioner, 13 T.C. 344 (1949); Duncan v. Commissioner, 17 B.T.A. 1088 (1929); see Smith v. Warren, supra.

Here, in accord, we submit, with the foregoing principles, the Commissioner allowed the taxpayer deductions for estimated living expenses incurred while he was in Spokane--on the ground that it was a minor business post. Further, determining that Los Angeles was the taxpayer's principal place of business, the Commissioner allowed him the deductions he claimed for expenses incurred in traveling to other cities in pursuit of his business. See fn. 9, supra, p. 7. Accordingly, the only traveling expenses at issue here are those incurred in the vicinity of Los Angeles.

Taxpayer, despite his seven-year career as a Los Angeles Dodger--from June, 1959, through November, 1966 (I-R. 31-32; Pet. Br. 23)--chose for that entire period to maintain his residence and, when not playing baseball or engaged in certain other business activities, to live with his wife and family in the vicinity of Spokane, Washington (I-R. 34, 45; II-R. 4-5, 30, 44). He never moved his family to the vicinity of Los Angeles, the Dodgers' home city and headquarters, where approximately 50 percent of their ball games were played each season. (I-R. 38, 51; Exs. 8-H, 9-I.) Because of the location of his residence in Veradale, taxpayer contends (Br. 18-23) that the expenses in question are deductible as expenses incurred (Section 162(a)(2)) "while away from home in the pursuit of a trade or business." We disagree. As the Tax Court here noted (I-R. 49, 50), in Commissioner v. Flowers, 326 U.S. 465, 470, 474 (1946), the Supreme Court stated that to be deductible, traveling expenses must be incurred "while away from home" and they must also be incurred because of the "exigencies of the business," as distinguished from "the personal conveniences and necessities" of the taxpayer. We contend that neither of these requirements for

deductibility was satisfied here, insofar as the expenses incurred in the vicinity of Los Angeles are concerned.

B. The expenses in question are not deductible because they were not incurred because of, or motivated by, the exigencies of business

In the Flowers case, supra, the taxpayer's residency in Jackson, Mississippi, and his family, social, religious, and business ties with that community were of a longer term and were more extensive than were the comparable associations of the instant taxpayer with Spokane (or Veradale) Washington. (Compare 326 U.S., pp. 467-468, with I-R. 34-35, 45-46, and II-R. 42-45, 51-52, 58-61, 66-67.) Indeed, in that case, the taxpayer--primarily out of personal choice--spent more of his time in Jackson and did more work for his employer there than he did in Mobile, Alabama. Nevertheless, as the Supreme Court noted (326 U.S., p. 468) the "taxpayer's principal post of business" was at Mobile for, with one exception, he could have--and normally would have--pursued his principal business activities there, rather than in Jackson. Accordingly, the Court held that the expenses incurred by the taxpayer in traveling between Jackson and Mobile, and his extra living expenses incurred in Mobile, were not incurred in pursuit of business--that is, they were not required or motivated by the exigencies of business--but, instead, were incurred for personal reasons, namely, the taxpayer's desire to continue to reside in Jackson.

The principal-post-of-business (or exigencies-of-business) rationale of the Flowers case is, we submit, clearly applicable to the instant case, as the Tax Court here held. (I-R. 51-52.) See also Rev. Rul. 54-147, 1954-1 Cum. Bull. 51. Without detailing all of

the facts supporting the Tax Court's finding here (I-R. 51, 53-54) that Los Angeles, instead of Spokane, was the taxpayer's principal place of business, the following facts are significant:

Only about a year after taxpayer moved to Spokane, he was called up to the Dodgers--in June, 1959, during the baseball season--and he continued to play ball for the Dodgers through November, 1966.[14/] (I-R. 31-32, 45; II-R. 1, 30, 42-43.) Beginning with 1959, his first season, and during the years involved, his performance as a ballplayer for the Dodgers was more than satisfactory and, with respect to the number of bases he stole, it was extraordinary, particularly in 1962. The taxpayer was clearly a popular member and mainstay of the Dodger team and his outstanding performance in 1962 was undoubtedly a key factor in the home attendance record set by the Dodgers for that year. (I-R. 32-34, 36, 38, 46-47; II-R. 14, 40-42, 45-46, 63; Ex. 7-G.)

Each season, the Dodgers played approximately one-half of their games at their stadium located in Los Angeles, the club's home city[15/] (I-R. 51; Exs. 8-H, 9-I), and the taxpayer spent at least 87 days in 196 and in 1963 in Los Angeles as a member of the Dodger team (I-R. 45).

14/ The taxpayer's contractual relationship with the Dodgers was on a yearly basis and each time the Dodger Club exercised its contractual option to retain the taxpayer for the next season, it was obligated to pay him at least 75 percent of his preceding year's salary. (Exs. 3-C, 4-D.)

15/ The club did not play nearly that many games in any other National League city and, of course, did not play any ball games in Spokane. (Exs. 8-H, 9-I.)

The Dodgers paid the taxpayer a salary of approximately $38,000 in 1962 and $45,000 in 1963. (Exs. 1-A, 2-B; see also Exs. 3-C, 4-D.) The salaries were paid to the taxpayer primarily for his services as a ball player. Even the $5,000 paid to him in 1962 and 1963 for public relations and promotional activities on behalf of the Dodgers in Spokane (I-R. 46; II-R. 30-31) was not dependent on the taxpayer's being located in Spokane. Instead, his effectiveness in performing that work was primarily dependent upon his well-known status as a member of the Dodger team and he would have been able to perform much the same type of promotional work for the Dodgers had he lived in the Los Angeles area. (I-R. 46, 52; II-R. 30-31, 49-52, 58-59.) As the Tax Court stated (I-R. 52), the taxpayer's "services in Spokane were a by-product of his association with the Dodgers."

The taxpayer spent time in Los Angeles in 1963 rehearsing for his night club routine (I-R. 35-36, 45), from which he reported a gross income of $19,400 in 1963 (Ex. 2-B, p. 10), earned some income from other sources there, and had business contacts and other associations with Los Angeles (I-R. 46; II-R. 31-32, 46-49, 53-55, 57-58, 62-63, 66).

Aside from the promotional activities carried on by the taxpayer in Spokane on behalf of the Dodgers, referred to above, the taxpayer carried on no significant business or other income-earning activities in Spokane.[16/] It could not, then, have been primarily business reasons that motivated taxpayer to continue to reside in Spokane and thereby incur the extra living expenses in question. Instead, the attractiveness of that area to the taxpayer was its proximity to excellent outdoor recreational facilities, especially for hunting and fishing, sports which the taxpayer (II-R. 45) "practically live[d] for." (See also, II-R. 66-67.) Accordingly, even though in years prior to 1958 (the year in which the taxpayer moved to Spokane), his family ordinarily moved with him when he changed ball clubs (II-R. 42-43), the taxpayer had no intention of abandoning Spokane as his family residence (Pet. Br. 18-19). This is true even though he has been employed since December, 1966, as a ball player for the Pittsburgh Pirates team. (Pet. Br. 23; see also II-R. 1, 30.)

Had the taxpayer maintained his personal (and family) residence in Los Angeles while pursuing his livelihood there, the meal and lodging expenses he incurred in that vicinity would not be deductible. The taxpayer's situation would be the same, with respect to such expenses, as that of other taxpayers (James v. United States, 308 F. 2d 204, 206 (C. A. 9th, 1962)) "whose business does not require travel, and who therefore pay tax upon all of the income which they devote to their personal living

16/ See fn. 8, supra, p. 6.

expenses." Likewise, in that situation his expenses incurred in traveling between his work locations in Los Angeles and his residence there would be (Smith v. Warren, 388 F. 2d, p. 672)--

> "commuting" costs, which have long been classified as non-deductible under section 262 of the Code, 26 U.S.C. § 262 (1964), as "living and personal expenses lacking the necessary direct relationship to the prosecution of the business." Commissioner of Internal Revenue v. Flowers, 326 U.S. 465, 473, 66 S.Ct. 250, 254, 90 L.Ed. 203 (1946). See sections 1.62-1(g), 1.162-2(e) and 1.262-1(b) (5) of Treasury Regulations on Income Tax (1954 Code).

Here, the result should be the same with respect to the travel and living expenses incurred by the taxpayer in the Los Angeles area because that area was his principal place of business. He continued to maintain his residence in the vicinity of Spokane, Washington, during the seven years that he played baseball for the Los Angeles Dodgers and thereby incurred the extra living expenses in question primarily for personal, not business, reasons. Cf. Commissioner v. Flowers, 326 U.S. p. 473.

Since the question here--the location of the taxpayer's principal place of business--is essentially factual (United States v. Mathews, 332 F. 2d 91 (C. A. 9th, 1964); Peurifoy v. Commissioner, 358 U.S. 59 (1958), affirming 254 F. 2d 483 (C.A. 4th, 1957); Green v. Commissioner, 35 T.C. 764 (1961), affirmed, 298 F. 2d 890 (C.A. 6th, 1962)), the Tax Court's finding (I-R. 51, 53-54) that Los Angeles was the taxpayer's principal place of business is

subject to the clearly erroneous rule (Commissioner v. Duberstein, 363 U.S. 278 (1960)). Since the taxpayer earned, by far, more of his income in Los Angeles than he did in any other one city, devoted (leaving aside spring training in Florida) approximately one-half of his active business year--the baseball season--to pursuing his principal business there, and had other business associations with Los Angeles, while, by contrast, aside from his public relations work, he carried on no significant business activities in Spokane, the Tax Court did not clearly err in finding that Los Angeles was his principal place of business. Commissioner v. Flowers, supra.

C. Further, since the taxpayer's "home" for purposes of the statute was located in Los Angeles, he did not incur the expenses in question "while away from home"

In the light of the foregoing discussion, we submit that the expenses in question were not incurred because of, or motivated by, the exigencies of business, as required by the statute for deductibility. Commissioner v. Flowers, supra. Further, we submit, no deduction is allowable because the expenses were not incurred "while away from home" within the meaning of the statute.

As the Supreme Court noted in the Flowers case, supra, the Commissioner's long-standing administrative rulings have been (326 U.S., p. 472, fn. 5) "explicit in treating the statutory home as the abode at the taxpayer's regular post of duty." The Tax Court and at least five Courts of Appeals--the First, Second, Third, Fourth, Seventh and Eighth Circuits--agree with this administrative position,

and the Supreme Court has sustained it with respect to a military officer's post of duty. Commissioner v. Stidger, 386 U.S. 287, 290-292 (1967) (and see the rulings and cases there cited), reversing 355 F. 2d 294 (C. A. 9th, 1965).[17/] Accordingly, we contend that if we are correct in our position that Los Angeles was the taxpayer's principal place of business, then the expenses in question were not incurred "while away from home." While we recognize that this Court disagrees with that definition of "home" (e.g., see Stidger v. Commissioner, 355 F. 2d 294 (C. A. 9th, 1965), reversed, 386 U.S. 294 (1967), and Wright v. Hartsell, 305 F. 2d 221 (C. A. 9th, 1962)), we contend further that under this Court's alternative criteria for deductibility, namely, whether it would have been reasonable for the taxpayer to move his residence to Los Angeles (see Stidger v. Commissioner, 355 F. 2d, pp. 298-300), no deduction is allowable here. See Part B, supra, and Part D, infra.

D. None of the exceptions to the foregoing rules apply here to allow the taxpayer a deduction for the expenses incurred in Los Angeles

Whether the issue here is approached from the standpoint of the "while away from home" requirement, as interpreted by the Commissioner in Part C, supra, or of the "exigencies of business" requirement (Part B, supra), none of the exceptions to either requirement apply here to allow the taxpayer to deduct the expenses in question.

17/ In Stidger, the dissenting opinion, in contending that "home" means one's residence, qualified that definition by acknowledging that (386 U.S., p. 297) "a taxpayer should establish his residence as near to his place of employment as is reasonable." Here, taxpayer, by refusing to move to the vicinity of Los Angeles, has failed to meet even the dissent's requirement.

The Commissioner recognizes that where a taxpayer's employment at a particular location is temporary, rather than indefinite, indeterminate, or otherwise more permanent, in anticipated duration, his transportation expenses incurred in traveling to that area and his expenses incurred in living there may be deductible because, in that situation, the expenses are occasioned by his pursuit of business, not by a personal choice of locating his home far from his business location. Rev. Rul. 60-189, 1960-1 Cum. Bull. 60, 61-64; Peurifoy v. Commissioner, 358 U.S. 59 (1958), affirming 254 F. 2d 483 (C. A. 4th, 1957); Coburn v. Commissioner, 138 F. 2d 763 (C. A. 2d, 1943); Schurer v. Commissioner, 3 T.C. 544 (1944). While taxpayer contends (Br. 19, 23) here that the Dodgers could fire or trade him at will, the taxpayer's business location in Los Angeles was clearly not temporary within the meaning of Rev. Rul. 60-189 and the cases applying the temporary-versus-indefinite employment location test.

As already stated herein (Part B, supra), the taxpayer's performance for the Dodgers was more than satisfactory his first season (1959) with them and was thereafter--especially during the years involved--outstanding. He was an extremely popular Dodger, whose exploits helped the Dodgers set a new home attendance record in 1962. (See I-R. 38; II-R. 41-42.) Under these circumstances, so long as taxpayer's performance continued to be satisfactory, he could reasonably expect to continue to be employed by the Dodgers and, in fact, his career as a Dodger extended over a period of seven years, from

1959 through 1966. (See Part B, supra, p. 12.) In this era of mobility of the American taxpayer, the taxpayer's business location in Los Angeles as a member of the Dodger team was probably more permanent than that of many other taxpayers--particularly those employed by large corporations--with presumably permanent positions in established business locations. Transfers occur even in such relatively stable employment situations and they cannot always be anticipated. But that does not mean that such taxpayers have only temporary job locations. Similarly, an established major league baseball player, like the taxpayer here, who is a definite asset to his team, is not likely to be quickly transferred, even though transfers of such players are occasionally made. Here, for example, only after the taxpayer served seven years with the Dodgers was such a transfer made. (See Pet. Br. 23.) A baseball team's success at the home ticket office is necessarily dependent upon its reasonable success in winning ball games and upon the popularity of its best players. (See I-R. 38; II-R. 41-42.) Since such success is dependent upon players like the taxpayer in the instant case, it cannot be assumed that the Dodgers would readily trade him. Accordingly, the taxpayer cannot reasonably contend that his employment location with the Dodgers during the years involved was temporary within the meaning of Rev. Rul. 60-189, supra, and the cases cited supra.

For the same reasons set out immediately above, the taxpayer cannot show here that it was (Harvey v. Commissioner, 283 F. 2d 491, 495 (C. A. 9th, 1960)) "very likely that * * * [his] stay away from * * * [Spokane would] be short." Instead, at the beginning of the taxable years involved, when taxpayer had already served three seasons with the Dodgers, there was (283 F. 2d, p. 495) "a reasonable probability known to him that he [might] * * * be employed for a long period of time" with the Dodgers at Los Angeles. Accordingly, it was, we submit (Stidger v. Commissioner, 355 F. 2d, p. 298) "reasonable to expect the taxpayer to move his residence to his place of employment" in Los Angeles. It follows that even under this Court's Harvey case test, with which the Commissioner disagrees (Rev. Rul. 61-96, 1961-1 Cum. Bull. 749), the taxpayer should not prevail.

The cases relied on by the taxpayer (Br. 20-22) (Hall v. Commissioner, decided June 8, 1964 (P-H Memo T.C., par. 64,157), and Gooderham v. Commissioner, decided June 8, 1964 (P-H Memo T.C., par. 64,158)) are distinguishable on their facts for the reasons stated by the Tax Court (I-R. 52-54). Unlike the taxpayer here involved, those taxpayers did not have a principal business location where half of their professional performances were carried on each season. Instead, they performed in various cities, spending only a short period of time in each city, much like construction workers with temporary work locations. Cf. Rev. Rul. 60-189, supra; Mathews v. Commissioner, 310 F. 2d 98 (C. A. 9th, 1962). Further,

in those cases, the expenses were clearly incurred in the pursuit of their trades or businesses and the fundamental question was whether the taxpayers maintained a "home" where they resided to be away from. The Tax Court, relying strongly on Gustafson v. Commissioner, 3 T.C. 998 (1944), concluded that they did and that they were, therefore, not itinerants. Cf. James v. United States, 308 F. 2d 204 (C. A. 9th, 1962); Hicks v. Commissioner, 47 T.C. 71 (1966). By contrast with those cases, in the instant case, our primary position is that the taxpayer's extra living expenses were non-deductible personal expenses incurred because he refused, primarily for personal reasons, to move his residence to Los Angeles, his principal place of business.[18/]

II

THE FAIR MARKET VALUE OF THE "MOST POPULAR DODGER" AWARD, AN MG AUTOMOBILE, AND OF THE "OUTSTANDING PROFESSIONAL ATHLETE" AWARD, THE HICKOK BELT, ARE INCLUDIBLE IN TAXPAYER'S GROSS INCOME

In 1962, the taxpayer received an MG automobile, provided and presented by an automobile agency, as an award for being elected the "most popular Dodger" by the baseball patrons at the Dodger's final home game of the 1962 season. (I-R. 33-34, 46-47; see also Ex. 8-H.) In 1963, he received the S. Rae Hickok award, a jeweled belt, provided and presented by the Hickok Belt Company of Rochester, New York, for

18/ Unlike the situation in Hall and Gooderham, we do not contend here that taxpayer was an itinerant, for he maintained a substantial abode in Spokane.

being elected the "outstanding professional athlete" of 1962 by votes taken among a group of more than 250 sportswriters and sportscasters. (I 36, 38, 47; Exs. 6-F, 7-G.)

Taxpayer contends (Br. 24-29) that both awards are excludable from his gross income pursuant to Section 74(b), Appendix, infra. We contend that that provision is inapplicable and that both awards are therefore includible in gross income pursuant to Sections 61(a) and 74(a)[19], Appendix, infra.

19/ The language of Section 61(a) (and its predecessor provisions in prior Revenue Acts) clearly expresses "the intention of Congress to tax all gains except those specifically exempted" (Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 430 (1955); Commissioner v. LoBue, 351 U.S. 243 (1956); United States v. Woodall, 255 F. 2d 370 (C. A. 10th, 1958), certiorari denied, 358 U.S. 824. See also James v. United States, 366 U.S. 213, 219 (1961); Rudolph v. United States, 370 U.S. 269, 273 (1962)).

The Committee Reports on the 1954 Code make it clear that Congress intended to exercise its fullest taxing power in Section 61. The Committee Reports stated (H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A18-A19 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4155); S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 168-169 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4802)):

> Section 61(a) provides that gross income includes "all income from whatever source derived." This definition is based upon the 16th Amendment and the word "income" is used in its constitutional sense.

It is clear that neither award was made with the requisite disinterested generosity (Commissioner v. Duberstein, 363 U.S. 278 (1960)) that would allow it to be excluded from gross income as a gift pursuant to Section 102, and there is no contention here that the gift exclusion applies. Cf. Simmons v. United States, 308 F. 2d 160, 164 (C. A. 4th, 1962). Further, the specific purpose and effect of Section 74(a) was to make it clear that all awards and prizes not coming within one of the specified categories set out in Section 74(b) are includible in gross income and not excludable therefrom as gifts. Section 1.74-1(a) of the Treasury Regulations on Income Tax (1954 Code), Appendix, infra; H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 11,

(continued)

Section 74(b) provides that "Gross income does not include amounts received as prizes and awards made primarily in recognition of religious, charitable, scientific, educational, artistic, literary, or civic achievement." Taxpayer contends (Br. 25, 27-28) that the awards in question were made primarily in recognition of "artistic" or "civic" achievements.

Turning first to the question of whether the awards were made primarily in recognition of "civic" achievements, while taxpayer had "a creditable record of social service" (I-R. 56; see also II-R. 14-15, 31, 39, 65), the fact remains that taxpayer has failed to prove that he received either award because of, or in recognition of, such services.

The taxpayer received the MG automobile for being elected the "most popular Dodger" in 1962. As the Tax Court here stated (I-R. 58), popularity itself is not one of the categories of achievements set forth in Section 74(b). Further, in 1962, the taxpayer astounded the baseball world with an amazing demonstration of base-stealing, shattering a major league record established by Ty Cobb approximately 47 years before. (I-R. 32, 46; Ex. 7-G.) Insofar as the record discloses, it was this outstanding demonstration of athletic skill that delighted the fans and prompted them to elect him the most popular Dodger in 1962. (II-R. 41-42.) Indeed, most of his fans,

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19/ (continued)
A27 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4036, 4163-4164); S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 13, 178-179 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4642, 4813); 1 Senate Hearings before the Committee on Finance on the Internal Revenue Code of 1954, 83d Cong., 2d Sess., p. 12; Commissioner v. Duberstein, 363 U.S. 278, 290 (1960) (dictum); Hornung v. Commissioner, 47 T.C. 428, 435 (1967). Cf. Simmons v. United States, 308 F. 2d, p. 164.

in voting for him, may not even have known, or may not have been primarily concerned about, his social services. They were baseball fans, and he was popular with them primarily because he performed extremely well for them as a ballplayer.

As for the Hickok award, the Tax Court's finding here that (I-R. 56) it was "made primarily in recognition of athletic skills and that excellence in sport is the predominant criterion for selection", and, therefore, that it was not made primarily in recognition of his social services, is amply supported by the record (I-R. 36-38, 47; II-R. 14, 16, 18-21, 25-26, 68-70; Exs. 6-F, 7-G). Accordingly, neither award is excludable as one made primarily in recognition of a civic achievement. Hornung v. Commissioner, 47 T.C 428, 436-437 (1967); see Simmons v. United States, 308 F. 2d 160, 163 (C. A. 4th, 1962).

Taxpayer contends (Br. 27-29) that both awards were made primarily in recognition of an (Section 74(b)) "artistic" achievement because, he contends, stealing bases is an art and he is, therefore, an artist. We do not dispute that stealing bases, as taxpayer did, requires great preparation and athletic skill, and that taxpayer performed this skill remarkably well. (I-R. 32, 46; II-R. 33-38.) It is clear, however, from both the terms of Section 74(b) and its purpose, as disclosed by its legislative history, that the term "artistic * * * achievement" in that provision is limited to the spe category of activities which are inherently or substantively artisti or aesthetic in nature, and would include the fine arts--namely,

painting, drawing, architecture, sculpture, poetry, music, dancing, dramatics, and similar "artistic" activities.

Section 74(b) sets forth seven different categories of achievements: "religious, charitable, scientific, educational, artistic, literary, or civic." While some of these terms are more specific than others (e.g., "scientific" would appear to be more precise than "charitable" or "civic"), each refers to, and describes the substantive quality or character of, the achievement in question. For example, just as "scientific" and "educational" describe (Hornung v. Commissioner, 47 T.C., p. 436) "certain types of personal achievement[s]", "artistic" also describes a substantive category of activities and achievements, and does not, as taxpayer contends, refer to the particular manner in which, or skill with which, other types of activities, such as an athletic sport, might be conducted. In determining the meaning of "artistic" the maxim noscitur a sociis clearly applies. See Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307 (1961), affirming 278 F. 2d 148, 151-153 (C. A. 1st, 1960); Neal v. Clark, 95 U.S. 704, 708-709. As stated in Simmons v. United States, 308 F. 2d, p. 163, "the crucial test is the nature of the activity being rewarded." (Emphasis supplied.)

While seven specific categories were included in the statute, certain other categories, which might have been included--such as "professional", "business", and "athletic"--were not. Inclusio unius est exclusio alterius. It is, therefore, evident that Congress did not wish to allow exclusions for awards made primarily for recognition of achievements in those activities, regardless of the skill or dedication to that activity that the achievement represents. Hornung v. Commissioner, 47 T.C., p. 437.

All of the categories listed in Section 74(b) have one other aspect in common--"they all represent activities enhancing in one way or another the public good". Simmons v. United States, 308 F. 2d, p. 163. It was awards made in recognition of outstanding achievemen in such activities--for example, the Nobel and Pulitzer prizes--that Congress intended to exclude from income by enacting Section 74(b). See H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 11, A27 (3 U.S.C. Cong & Adm. News (1954) 4017, 4036, 4163-4164); S. Rep. No. 1622, 83d Cong 2d Sess., pp. 13, 178-179 (3 U.S.C. Cong. & Adm. News (1954) 4621, 46 4813); 1 Senate Hearings before the Committee on Finance on the Intern Revenue Code of 1954, 83d Cong., 2d Sess., pp. 12, 482-483. In the light of the foregoing, we submit, an award for outstanding success i professional baseball, like one in professional football or in a fish competition, cannot be considered to have been made primarily in reco of either an "artistic" or a "civic" activity within the meaning of Se 74(b). Hornung v. Commissioner, 47 T.C., p. 437; Simmons v. United S 308 F. 2d, pp. 162-164.

Taxpayer also contends (Br. 25-26) that the Hickok award is a "trophy" in that taxpayer intends that it will be possessed and cherished, not sold. It is beyond serious dispute, however, that the belt had a fair market value of approximately $6,000 (I-R. 36, 47; Ex. 5-E; cf. Pet. Br. 10) and that it could be sold, or dismantled and sold (see I-R. 47; II-R. 32-33; Ex. 5-E). Accordingly, its fair market value--the best objective measure of its value--is the correct amount to be included in taxpayer's income. Section 1.74-1(a) of the Treasury Regulations on Income Tax (1954 Code), Appendix, infra; cf. Koons v. United States, 315 F. 2d 542, 545 (C. A. 9th, 1963). While the belt may be a trophy in the sense the taxpayer uses that term, it is, nevertheless, for reasons already stated, an award, and is, therefore, includible in gross income pursuant to Sections 61(a) and 74(a).[20/]

20/ Those who provide such awards can readily protect the recipients from substantial tax liability, either by restricting the alienability of the article constituting the award, thereby reducing its market value, or by providing for it to be transferred yearly from one recipient to the next, as is done with some awards.

Non-tax considerations, of course, may militate against such procedures. For example, it is not unknown for athletes sometimes to fall on hard times after their years of ability are past. Here, while the Hickok Belt Company wished to provide the recipients with something of value to honor them (II-R. 27), it also provided them with something of substantial economic value which might benefit them financially at any time.

In the light of the foregoing discussion, the Tax Court, we submit, was correct in holding that the awards in question are includible in gross income pursuant to Sections 61(a) and 74(a). This does not mean, of course, that a future Congress may not be pursuaded that there are equitable and policy considerations justifying the exclusion of athletic awards such as the MG automobile and the Hickok belt involved here, despite the practical value of the former and the high intrinsic value of the latter. For example, on September 13, 1967, Senator Smathers, referring specifically to the Tax Court decision in the instant case, introduced a bill (S. 2397, 90th Cong., 1st Sess.) providing, inter alia, that Section 74(b) be amended by striking out "civic" and inserting in lieu thereof "civic or athletic", such amendment to apply to prizes and awards received after its enactment into law. See 113 Cong. Record, No. 144, pp. S 12886-12887 (September 13, 1967).[21] Similar bills have been introduced in the House

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21/ In introducing his bill, the Senator stated (113 Cong. Record, p. S 12887):

> Mr. President, I certainly do not mean to be critical of the Tax Court in this matter. The court correctly observed that Congress has not expressed itself in this area by placing athletic awards on a par with those given for religious, charitable, scientific, educational, artistic, literary, and civic achievement, for which section 74 now provides an exclusion from gross income.
>
> My own feeling is that prizes of this nature do not constitute income in the generally accepted sense of that term, and should not be regarded as such. This amendment would furnish a vehicle for legislative action to bring about this result.

of Representatives during the First Session of the 90th Congress.[22/] But, unless and until Congress decides that such considerations are sufficiently persuasive to justify the exclusion of such awards, they remain taxable.

CONCLUSION

For the reasons stated above, the decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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JULY, 1968.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this _____ day of July, 1968, in an envelope, with postage prepaid, properly addressed to him as follows:

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22/ See H.R. 12453 (113 Cong. Record, No. 131, p. H 10812 (August 16, 1967)); H.R. 13190 (113 Cong. Record, No. 154, p. H 12743 (September 28, 1967)); H.R. 13890 (113 Cong. Record, No. 177, p. H 14390 (November 1, 1967)); H.R. 13823 and H.R. 13825 (113 Cong. Record, No. 178, p. H 14529 (November 2, 1967)); H.R. 13875 (113 Cong. Record, No. 179, p. H 14586 (November 3, 1967)); H.R. 13946 (113 Cong. Record. No. 183, p. H 15055 (November 9, 1967); H.R. 13979 (113 Cong. Record, No. 184, p. H 15160 (November 13, 1967)).

APPENDIX

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) General Definition.--Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

* * *

(26 U.S.C. 1964 ed., Sec. 61.)

SEC. 62. ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

* * *

(2) Trade and business deductions of employees.--

* * *

(B) Expenses for travel away from home.--The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

* * *

(26 U.S.C. 1964 ed., Sec. 62.)

SEC. 74. PRIZES AND AWARDS.

(a) General Rule.--Except as provided in subsection (b) and in section 117 (relating to scholarships and fellowship grants), gross income includes amounts received as prizes and awards.

(b) Exception.--Gross income does not include amounts received as prizes and awards made primarily in recognition of religious, charitable, scientific, educational, artistic, literary, or civic achievement, but only if--

(1) the recipient was selected without any action on his part to enter the contest or proceeding; and

(2) the recipient is not required to render substantial future services as a condition to receiving the prize or award.

(26 U.S.C. 1964 ed., Sec. 74.)

SEC. 162 [as amended by Sec. 4(b), Revenue Act of 1962, P. L. 87-834, 76 Stat. 960]. 23/ TRADE OR BUSINESS EXPENSES.

(a) In General.--There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including--

* * *

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; * * *

* * *

(26 U.S.C. 1964 ed., Sec. 162.)

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(26 U.S.C. 1964 ed., Sec. 262.)

23/ This amendment applies to the taxable year 1963, involved herein, but does not have any material effect on the issue. See fn. 11, supra, p. 8.

Treasury Regulations on Income Tax (1954 Code):

§ 1.62-1 Adjusted gross income.

* * *

(b) Section 62 merely specifies which of the deductions provided in chapter 1 of the Code shall be allowed in computing adjusted gross income. It does not create any new deductions. The fact that a particular item may be specified in more than one of the paragraphs under section 62 does not permit the item to be twice deducted in computing either adjusted gross income or taxable income.

(c) The deductions specified in section 62 for the purpose of computing adjusted gross income are:

* * *

(3) Deductions allowable under part VI which constitute expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee;

* * *

(g) Transportation expenses paid or incurred by an employee in connection with performance by him of services for his employer are deductible from gross income under part VI in computing adjusted gross income. * * * The term "transportation expense" includes only the cost of transporting the employee from one place to another in the course of his employment, while he is not away from home in a travel status. * * * Transportation expenses do not include the cost of commuting to and from work; this cost constitutes a personal, living, or family expense and is not deductible. (See section 262.)

* * *

(26 C.F.R., Sec. 1.62-1.)

§ 1.74-1 Prizes and awards.

(a) Inclusion in gross income. (1) Section 74(a) requires the inclusion in gross income of all amounts received as prizes and awards, unless such prizes or awards qualify as an exclusion from gross income under subsection (b), or unless such prize or award is a scholarship or fellowship grant excluded from gross income by section 117. Prizes and awards which are includible in gross income include (but are not limited to) amounts received from radio and television give-away shows, door prizes, and awards in contests of all types, as well as any prizes and awards from an employer to an employee in recognition of some achievement in connection with his employment.

(2) If the prize or award is not made in money but is made in goods or services, the fair market value of the goods or services is the amount to be included in income.

(b) Exclusion from gross income. Section 74 (b) provides an exclusion from gross income of any amount received as a prize or award, if (1) such prize or award was made primarily in recognition of past achievements of the recipient in religious, charitable, scientific, educational, artistic, literary, or civic fields; (2) the recipient was selected without any action on his part to enter the contest or proceedings; and (3) the recipient is not required to render substantial future services as a condition to receiving the prize or award. Thus, such awards as the Nobel prize and the Pulitzer prize would qualify for the exclusion. Section 74 (b) does not exclude prizes or awards from an employer to an employee in recognition of some achievement in connection with his employment.

* * *

(26 C.F.R., Sec. 1.74-1.)

§ 1.162-2 Traveling expenses.

(a) * * * Only such traveling expenses as are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it may be deducted. If the trip is undertaken for other than business purposes, the travel fares and expenses incident to travel are personal expenses and the meals and lodging are living expenses. * * *

* * *

(e) Commuters' fares are not considered as business expenses and are not deductible.

* * *

(26 C.F.R., Sec. 1.162-2.)

§ 1.262-1 Personal, living, and family expenses.

(a) In general. In computing taxable income, no deduction shall be allowed, except as otherwise expressly provided in chapter 1 of the Code, for personal, living, and family expenses.

(b) Examples of personal, living, and family expenses. Personal, living, and family expenses are illustrated in the following examples:

* * *

(5) Expenses incurred in traveling away from home (which include transportation expenses, meals, and lodging) and any other transportation expenses are not deductible unless they qualify as expenses deductible under section 162, * * * . The taxpayer's costs of commuting to his place of business or employment are personal expenses and do not qualify as deductible expenses. The costs of the taxpayer's lodging not incurred in traveling away from home are personal expenses and are not deductible unless they qualify as deductible expenses under section 217. Except as permitted under section 162, 212, or 217, the costs of the taxpayer's meals not incurred in traveling away from home are personal expenses.

* * *

(26 C.F.R., Sec. 1.262-1.)